HARVARD LAW REVIEW.

Published Monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

ON Friday, 25 October, the number of students in the Law School rose above two hundred and fifty. This fact is more noteworthy because it is the first time in the history of the School that this point has been reached. The increased membership is an evidence of growing confidence in the management of the School, — a confidence that seems partly warranted by the success of many of the recent graduates, —and as such it is gratifying to all interested in the work of the School. It must be a particular pleasure to the instructors whose efforts thus receive part of the appreciation that is their due.

IN the late case of *Reg.* v. *Tolson*[1] the Court for Crown Cases Reserved was called on to decide the question whether a woman who marries again after the absence of her husband for less than seven years, but with an honest and reasonable belief that he is dead, is guilty of bigamy, — a point on which previous decisions had been conflicting. The English statute makes it bigamy for a person to marry during the life of husband or wife; a proviso excludes from the operation of the statute the case of continuous absence of seven years or more when the absent party is not known to be living.

In *Reg.* v. *Tolson* nine judges were for acquittal and five for conviction. The "Law Quarterly" for October,[2] though not prepared to say that the decision is wrong, questions it somewhat. The case, however, commends itself to common sense, and seems to be right in point of law. There is no doubt that the Legislature has the power to pronounce a second marriage bigamy in any case except that excluded by the proviso, — to enact that no other circumstances shall be a defence; whether or not it has done so is a question of construction. But if such an enactment as this was intended, the most explicit language should have been used; and in the absence of such language the court appears to be justified, in view of the general principles of the criminal law, in refusing to pronounce criminal such an act as that of the defendant in *Reg.* v. *Tolson*. This view was put forward by Sir James Stephen in his Digest of the Criminal Law,[3] and the same learned writer and judge was one of the majority in *Reg.* v. *Tolson*.

---

[1] 23 Q. B. D. 168. [2] Vol. 5, p. 449. [3] P. 23, n. 4.

The decision seems to have been put on the ground just stated, and no great stress was laid on the doctrine *non est reus nisi mens sit rea.*

In Massachusetts, on a similar state of facts, an opposite decision was reached.[1]

THE final ruling of the court in the Cronin murder trial, admitting the testimony of a witness for the prosecution who had evaded the intended effect of the order excluding the State's witnesses from the court-room by reading the testimony in the newspapers, is in accord with the later and sounder decisions on the subject. The court is reported in the papers to have said: "The rule of extension would unquestionably apply as well to newspaper reading as to exclusion from the room, and in making my ruling at this time I feel that I am changing the rule, and I think it is necessary, in view of modern newspaper circulation." Instead of changing, the court appears to have followed the existing rule. In the case in question, merely the spirit of the court's order was violated, and unintentionally. In most of the decided cases the witness actually remained in court in direct disobedience of the order. Yet, on what would seem to be the sounder cases, the power of the judge is limited to punishing the witness for contempt;[2] and in jurisdictions where the judge is held to have the right altogether to exclude the disobedient witness, if he sees fit, that right is very rarely exercised.[3]

WHILE writers are clamoring for a restatement of the hearsay rules of evidence, legislatures continue to make minor changes. The agitation and the legislation are proofs of discontent with the present state of things, and presage, perhaps, more extensive alterations. Massachusetts during the past year has enacted a relaxation in one small particular,—a tardy reform, even if trivial. It is almost fifty years since it was made a crime as serious as manslaughter to cause death by attempted abortion; and now chapter one hundred of the Acts and Resolves of 1889 allows the admission in evidence of the dying declaration of a woman in a criminal prosecution[4] for causing her death. There exists a similar statute in New York.[5]

But the Massachusetts statute leaves open one point that may give a little trouble: it does not specify for what precise purposes such declarations may be used. So far as the wording of the statute goes, there is no objection to using these dying declarations for the proof of any fact that may be controverted, provided the case is one where the death of the woman is alleged to have resulted from the use of drugs, etc. If this obvious construction of the statute be the true one, the use of dying declarations in this class of cases will be extended beyond their scope in actions for homicide at common law.[6] The corresponding New York statute, mentioned above, precludes any doubt, by providing that such declarations "shall be admitted in evidence subject to the same restrictions as in cases of homicide." Even if the statute be one of no great importance, and even if the meaning of the statute be apparently clear, still it seems that it would have been better to provide against any latent doubt by the addition of a few words.

---

[1] *C.* v. *Mash*, 7 Met. 472; but see the comments of Bishop, Crim. Law, 303 a, note 4, 15, who remarks that the case is not in accord with some other authorities in this country.
[2] *Cobbett* v. *Hudson*, 1 E. & B. 11; *Gregg* v. *State*, 3 W. Va. 705; *Parker* v. *State*, 37 Md. 329.
[3] *Pleasant* v. *State*, 15 Ark. 624; *Sartorious* v. *State*, 24 Miss. 602.
[4] Under P. S., ch. 207, § 9.
[5] Banks' Revised Statutes of New York, 6th ed., vol. 3, pt. 2, ch. 1, § 14, at p. 933.
[6] Best on Evidence, p. 484, n., Chamberlayne's ed.

THE writer of a recent article[1] in the "Law Quarterly Review," while commenting on the notoriously onerous and thankless office of the English trustee, describes a system of joint-stock companies that has been developed and legalized in Victoria for the purpose of managing estates and investments in the place of executors, administrators, and trustees. These corporations or joint-stock companies have the rights, duties, and legal obligations of paid fiduciaries. In other words, Australia has adopted the American trustee in place of the English trustee.

But in the meantime England has allotted her trustees a little more freedom. The recently enacted Trust Investment Act,[2] supplanting quite a number of statutes[3] previously passed with a view to greater liberty of investment, permits an increased range for investing trustees. The effect of this act is, that a trustee may now, as previously, invest in securities on land situated in Great Britain and Ireland, in any securities the interest of which is or shall be guaranteed by Parliament, in stock of the banks of England and Ireland, in East India stock, in consolidated stocks of the Metropolitan Board of Works, or in stocks recommended by the court from time to time for the investment of cash. In addition, certain kinds of railway, canal, and water bonds and stocks, together with municipal and county loans, are now designated as proper investments. But the position of the English trustee is nevertheless not much improved. For instance, there are further restrictions as to the price to be paid for redeemable securities, while the designated stocks and bonds are very carefully selected. Furthermore, the fundamental distinction which contrasts the English trustee so strongly with the American trustee still remains — the English trustee receives no pay.

It is interesting, if not slightly flattering, to notice the triumph of the paid trustee with large discretion as to investments, over the old-time unpaid trustee of England in the new continent of Australia. This victory seems to justify the full powers given to fiduciaries in the United States, while at the same time it strengthens the doubt as to the relative efficiency of the English trustee even at home.

THE Court of Appeals of Kentucky must be overworked. Judge Holt seems to be convinced that ice in an ice-house may be treated as a fixture. "If it [*i. e.*, a chattel] have a special adaptation to the use to which the freehold is being applied, and its removal would seriously impair its value, then such an intention may fairly be inferred as to constructively connect it with the freehold, and the business for which it is being used. Turning from this general law of fixtures to the case in hand, we find that the property sold was an hotel for the use of which ice is almost, if not quite, indispensable,"[4] etc. It is not quite clear from the judge's language just what the ice is affixed to; ice-house, hotel, freehold, and business, together with realty, are all mentioned in dangerous proximity. We are afraid that some one[5] may feel called on to tell the truth to the Court of Appeals of Kentucky, even as Gil Blas felt moved to speak to the fictitious Archbishop of Granada.

---

[1] 5 L. Q. Rev. 395. Administration of Trusts by Joint-Stock Companies, T. Crisp Poole.

[2] 52 and 53 Vict. c. 32; L. R. 26 Stats. 97, 12 Aug. 1889.

[3] 22 and 23 Vict. c. 35, § 32, 1859; 23 and 24 Vict. c. 38, § 11, 1860; 30 and 31 Vict. c. 132, 1867; 34 and 35 Vict. c. 47, § 13, 1871.

[4] *Hill* v. *Munday*, 11 S. W. Rep. 956 (Ky.), 21 June, 1889. It may be observed, however, that this doctrine as to fixtures is not strictly necessary to the decision.

[5] See 40 Albany Law Journal, p. 102. "We wish that something could be done to infuse a little common sense," etc., etc.